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4 Attorneys for Defendant  
ROBERT MINEMIER

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7 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
8 SAN FRANCISCO DIVISION

9 UNITED STATES OF AMERICA, CR-07-0348 MAG  
10  
11 Plaintiff,  
12 v.  
13  
14 ROBERT MINEMIER,  
15 Defendant.  
16

NOTICE OF MOTION AND MOTION FOR  
REVIEW OF PERSONNEL FILES AND  
DISCLOSURE OF POTENTIAL  
IMPEACHMENT EVIDENCE  
[UNITED STATES v. HENTHORN]  
[Excludable Time: 18 U.S.C.  
§3161(h)(1)(F) & (J) through  
disposition]  
Date: August 8, 2007  
Time: 1:30 p.m.

17 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED  
18 STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

19 Defendant ROBERT MINEMIER, by and through counsel, will and  
20 hereby does move the Court for an order for discovery of the  
21 personnel files and related records of selected law enforcement  
22 agents employed by the United States Park Police who detained  
23 and arrested Mr. Minemier. Defendant seeks all records and  
24 information which pertain to any instance of conduct which might  
25 arguably reflect on the agents' character or credibility or  
26 which might arguably be used to develop impeachment information.  
27 This includes, but is not limited to, all instances involving  
allegations, complaints or acts of:

28 (1) false arrests;

- 1 (2) fabrication of charges;
- 2 (3) fabrication of evidence;
- 3 (4) unreasonable/illegal searches and seizures under the
- 4 Fourth Amendment to the United States Constitution;
- 5 (5) undue coercion and Miranda violations;
- 6 (6) dishonesty;
- 7 (7) improper tactics;
- 8 (7) neglect of duty;
- 9 (8) prior drug usage; and
- 10 (9) any other instance of conduct reflecting on
- credibility, veracity or potential bias.

11 The information sought by defendant concerning such  
12 allegations, complaints or acts includes, but is not limited to,  
13 the following:

- 14 (1) The names, addresses and telephone numbers of persons  
15 who submitted any of the allegations or complaints  
described above;
- 16 (2) The names, addresses, and telephone numbers of all  
17 persons, whether police officers or private witnesses,  
mentioned as witnesses to the events described in the  
18 allegations, complaints or acts described above;
- 19 (3) A copy of all statements made by the complainants and  
all witnesses who were interviewed in the  
20 investigation of the allegations, complaints or acts  
described above;
- 21 (4) A copy of all statements made by the officers/agents  
22 interviewed in the investigation of the allegations,  
complaints or acts described above;
- 23 (5) Verbatim copies of all other records, reports, notes  
24 and recordings made, and copies of photographs taken,  
in the course of the investigation of the allegations,  
25 complaints or acts described above;
- 26 (6) All agency records and statements of opinion about the  
agents' reputation relevant to the allegations,  
27 complaints or acts described above, including, but not  
limited to, findings, letters, formal reports,  
28 comments, evaluations, assessments, disciplines  
imposed, and/or records of conversations involving  
superiors or fellow agents of the personnel listed

1           herein pertaining to any of the actions noted in the  
2           allegations, complaints or acts described; and

- 3           (7) All documents, reports, files, folders, and other  
4           documentary material regarding any ongoing  
5           investigations being conducted by any entity within  
6           the relevant department/agency or the relevant Office  
7           of Citizen Complaints related to the allegations,  
8           complaints or acts referenced above.

9           Defendant Robert Minemier further requests that he be  
10          apprised of any information which tends to show that the  
11          information contained in any of the allegations, complaints or  
12          acts described above is no longer current, valid or complete.

13          This motion is made on the grounds that the personnel files  
14          of the law enforcement agents who investigated this case and who  
15          have percipient knowledge and therefore may be called to testify  
16          for the prosecution or the defense, are discoverable under the  
17          Due Process Clause of the Fifth and Fourteenth Amendments and  
18          applicable case law, including Brady v. Maryland, 373 U.S. 83  
19          (1963); Kyles v. Whitley, 514 U.S. 419 (1995); and United States  
20          v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and their progeny, to  
21          the extent that they contain exculpatory information and/or  
22          information tending to impeach the credibility of the officers.  
23          In camera review by the Court is appropriate.

24          This motion is supported by the accompanying Memorandum of  
25          Points and Authorities, the files and records in this case, and  
26          any further argument and evidence which may be presented at the  
27          time of the hearing of this motion.

28          Dated: July 25, 2007

\_\_\_\_\_  
/s/ ROBERT M. AMPARAN  
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MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR REVIEW OF PERSONNEL  
FILES AND DISCLOSURE OF  
POTENTIAL IMPEACHMENT EVIDENCE  
[UNITED STATES v. HENTHORN]

15  
16 INTRODUCTION

17 This motion asks the Court to order the prosecution to  
18 submit to the Court for review all personnel files of all law  
19 enforcement agents who detained, investigated, and/or arrested  
20 Mr. Minemier. The motion further requests that all information  
21 relevant to the credibility of these agents or that would  
22 otherwise lead to potentially exculpatory evidence be turned  
23 over to the defense<sup>1</sup>.

24 As discussed further below, the defense is entitled to  
25 request the Court to undertake an *in camera* review of each of  
26 the below-listed agents' personnel files to determine whether

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<sup>1</sup> This information can be turned over pursuant to a protective order specifically limiting its future use.

1 exculpatory or impeaching information in those personnel files  
2 must be disclosed to the defense in order to protect the due  
3 process rights of the defendants. The task implicated by this  
4 motion is necessary to assure these rights are protected.

5 Based on the government's disclosures, Mr. Minemier has  
6 identified the following federal law enforcement agent as likely  
7 to testify as a government witness at trial:

8 1. United States Park Police Officer Michael Cameron,  
9 Officer #212, San Francisco Field Office.

10 Defendant also respectfully reserves the right to  
11 specifically identify further law enforcement officers that he  
12 discovers are likely to testify as government witnesses in this  
13 case. This request includes the request for production of the  
14 specific information described herein and recited in the Motion  
15 filed herewith, and any other information which may possibly be  
16 helpful to the defense in this case.

17 ARGUMENT

18 DEFENDANT IS ENTITLED TO ALL RECORDS AND  
19 INFORMATION RELEVANT TO THE IMPEACHMENT OF  
20 THE INVESTIGATING AGENTS

21 The information sought by this motion is relevant to  
22 impeach the testimony and credibility of agents and/or officers  
23 who will be witnesses in this case at a potential suppression  
24 hearings or trial, to prove character traits of the agents in  
25 question, to establish their bias, and to prove their conduct,  
26 custom, propensity and habit in conformity with such traits.

27 The Due Process Clause of the Fifth Amendment requires the  
28 government to produce exculpatory evidence to the defendant.

29 See, e.g., Kyles v. Whitley, 514 U.S. 419, 432-34 (1995); Brady  
30 v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405

1 U.S. 150 (1972). Exculpatory evidence includes all evidence  
 2 which bears on witness' credibility or reliability. United  
 3 States v. Feola, 651 F.Supp. 1068, 1135 (S.D.N.Y. 1987). Thus,  
 4 the law requires that defendants be provided with information  
 5 regarding all prior material acts of misconduct by the govern-  
 6 ment witnesses. See, e.g., Singh v. Prutny, 142 F.3d 1157 (9th  
 7 Cir. 1998), *cert. denied*, 525 U.S. 956 (1998); United States v.  
 8 Siejo, 514 F.3d 1357 (2nd Cir. 1975), *cert. denied*, 429 U.S.  
 9 1043 (1977); United States v. Rosner, 516 F.2d 269 (2nd Cir.  
 10 1975), *cert. denied*, 427 U.S. 911 (1976).

11 Disclosure of impeachment information is necessary to  
 12 protect the right of a defendant to confront, cross-examine, and  
 13 impeach; this right is a cherished one and remains "the  
 14 principal means by which the believability of a witness and the  
 15 truth of his [or her] testimony are tested." Davis v. Alaska,  
 16 415 U.S. 308, 316 (1974).

17 The Ninth Circuit has noted that the scope of the Brady  
 18 doctrine is broad, having been interpreted to compel the  
 19 "disclosure of evidence that in any way may be exculpatory."  
 20 United States v. Miller, 529 F.2d 1125, 1128 (9th Cir.), *cert.*  
 21 *denied*, 426 US. 924 (1976) (emphasis in original).

22 In United States v. Agurs, 427 U.S. 97, 108 (1976), the  
 23 Supreme Court warned prosecutors that if any errors are to be  
 24 made, they should be made on the side of disclosure:

25 Because we are dealing with an inevitably  
 26 imprecise standard, and because the  
 27 significance of an item of evidence can  
 28 seldom be predicted accurately until the  
 entire record is complete, the prudent  
 prosecutor [or court] will resolve doubtful  
 questions in favor of disclosure.

1 In Kyles, 514 U.S. 419, the Supreme Court again reminded  
2 prosecutors that convictions will be reversed under Brady,  
3 unless prosecutors use a broader standard of "materiality" than  
4 prosecutors have employed. The Kyles court emphasized that an  
5 important type of exculpatory evidence is evidence which can be  
6 used to attack "the thoroughness and even the good faith of the  
7 investigation." The court specifically recognized that "A  
8 common trial tactic of defense lawyers is to discredit the  
9 caliber of the investigation or the decision to charge the  
10 defendant, and we may consider such use in assessing a possible  
11 Brady violation."

12 In United States v. Cadet, 727 F.2d 1453, 1467-68 (9th Cir.  
13 1984), the Ninth Circuit held that the government must review  
14 agents' personnel files and disclose information which may tend  
15 to impeach law enforcement agents to the defense. *Id.* at 1467-  
16 68. The Ninth Circuit set forth the procedure the prosecution  
17 must follow when confronted with a request by a defendant for  
18 the personnel files of testifying officers. The Cadet Court  
19 stated that the government must "disclose information favorable  
20 to the defense that meets the appropriate standard of material-  
21 ity ... If the prosecution is uncertain about the materiality of  
22 information within its possession, it may submit the information  
23 to the trial court for an *in camera* inspection and evalua-  
24 tion..." *Id.* at 1467-68.

25 In United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991),  
26 *cert. denied*, 503 U.S. 972, the defendant made a discovery  
27 request for impeachment material contained in the personnel  
28 files of testifying officers. The attorney for the United

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1 States refused to follow Cadet and opposed the request. The  
 2 United States argued that it had no duty to examine the  
 3 personnel files until the defendant made a showing that  
 4 instances of specific misconduct were likely to be contained in  
 5 the personnel files. The district court agreed. The Ninth  
 6 Circuit did not, and reversed and remanded for an *in camera*  
 7 review by the district court. The court held that:

8 [t]he government is incorrect in its  
 9 assertion that it is the defendant's burden  
 10 to make an initial showing of materiality.  
 11 The obligation to examine the files arises  
 12 by virtue of the making of a demand for  
 13 their production.

14 *Id.* at 31.

15 In Kyles, the Supreme Court held that it was the duty of  
 16 the individual prosecutor to personally inspect agency files and  
 17 discover any Brady material in the possession of other agencies.  
 18 514 U.S. at 437. The court specifically wrote: "the individual  
 19 prosecutor has a duty to learn of any favorable evidence known  
 20 to the others acting on the government's behalf in the case,  
 21 including the police." *Id.*

22 In Kyles, the state argued that a prosecutor cannot be  
 23 required to turn over information he or she does not personally  
 24 possess. This argument had previously been accepted by the  
 25 Ninth Circuit. See, United States v. Jennings, 960 F.2d 1488  
 26 (9th Cir. 1992); United States v. Dominguez-Villa, 954 F.2d 562  
 27 (9th Cir. 1992). The Supreme Court rejected that argument and  
 28 focused on the personal duty of the individual prosecutor:

To accommodate the state in this manner  
 would, however, amount to a serious change  
 of course from the Brady line of cases. In  
 the state's favor, it may be said that no



1           one doubts that police investigators some-  
2           times fail to inform a prosecutor of all  
3           they know. But neither is there any serious  
4           doubt that procedures and regulations can be  
5           established to carry the prosecutor's burden  
6           and to insure communication of all relevant  
7           information on each case to every lawyer who  
8           deals with it. Since, then, the prosecutor  
9           has the means to discharge the government's  
          Brady responsibilities if he will, any  
          argument for excusing a prosecutor from  
          disclosing what he does not happen to know  
          about boils down to a plea to substitute the  
          police for the prosecutor and even for the  
          courts themselves, as the final arbiters of  
          the government's obligation to ensure a fair  
          trial.

10           Kyles, 514 U.S. at 438.

11   Echoing Agurs, the court stated that "this means, naturally,  
12   that a prosecutor anxious about tacking too close to the wind  
13   will disclose a favorable piece of evidence. This is as it  
14   should be." *Id.*

15           Because Kyles, Brady and Giglio are based upon a  
16   defendant's due process right to a fair trial, it should not  
17   matter if the exculpatory information is in the hands of state  
18   or federal officials. "The individual prosecutor has a duty to  
19   learn of any favorable evidence known to the others acting on  
20   the government's behalf in this case, including the police."

21   Kyles, 514 U.S. at 437.

22           In the instant case, upon defendant's request, the  
23   government should be held responsible for the production of any  
24   and all federal agents files.

25           The Court could assure the impartiality and thoroughness of  
26   the review procedure by use of a magistrate judge, thus, conduct  
27   a judicial *in camera* review. The issues to be determined is one  
28   that is best observed by a neutral arbiter. It is hard to place

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1 a finger on such materials if the viewpoint is that of an  
2 advocate whose job is not combing documents for impeachment  
3 material. Similarly, there is an institutional bias.  
4 Impeachment material affecting credibility can and should  
5 include whether the officer has engaged in shading of the truth,  
6 "mischaracterizations" of fact short of perjury, or improper  
7 police practices.

8       The Justice Department policy stated in footnote 3 of  
9 Jennings, *supra*, may be the worst alternative, from the point of  
10 view of assuring the fairness of a review. It smacks of the fox  
11 guarding the chicken coop. According to the opinion, "the  
12 Department of Justice has instituted a policy designed to  
13 implement the holding of Henthorn. Under this policy, the files  
14 of law enforcement officers are to be examined by the  
15 appropriate agency's attorney or his staff. The agency legal  
16 staff will notify the federal prosecutor assigned to the case if  
17 any potential Brady material is found, and the AUSA will then  
18 determine whether the information should be disclosed or whether  
19 an *in camera* review by the district court is appropriate." 960  
20 F.2d at 1492, note 3.

21       The defense urges most strenuously against this procedure  
22 for the obvious reason that an agency's legal staff has every  
23 motive to hide material which the defense should properly  
24 receive by "characterizing" them as non-exculpatory. While it  
25 is true that under Kyles, the United States Attorney would be  
26 charged with the Brady violation if exculpatory material was  
27 disclosed later which was earlier withheld and reversal of a  
28 conviction could result, it is hard to conceive of how

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1 suppression of evidence by an agency's legal counsel would be  
2 uncovered.

3 CONCLUSION

4 For the reasons stated, defendant, Robert Minemier,  
5 respectfully requests that this Court order production and an *in*  
6 *camera* review of the personnel files of the law enforcement  
7 agents and officers listed above. Upon a determination that any  
8 file contains material relevant to impeachment or potentially  
9 exculpatory evidence, the materials should be disclosed to  
10 defense counsel subject to a protective order that the infor-  
11 mation should be used only for purposes of this case.

12 Dated: July 25, 2007

13 Respectfully submitted,

14  
15 /s/ ROBERT M. AMPARAN  
16 ROBERT M. AMPARAN

17 Attorney for Defendant  
18 ROBERT MINEMIER  
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